United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Affidavit

76-6185

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6185

FREDERICK W. SILVERMAN,
Plaintiff-Appellant,

—*against*—

J. WILLIAM MIDDENDORF, II, SECRETARY OF THE NAVY and COMMANDING OFFICER, BUREAU OF MEDICINE AND SURGERY, UNITED STATES NAVY,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS-APPELLEES' BRIEF ON APPEAL

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Defendants-Appellees.

DEFENDANTS-APPELLEES' BRIEF ON APPEAL

Preliminary Statement

This is an appeal by Dr. Frederick W. Silverman ("plaintiff") from an order of the United States District Court for the Southern District of New York, Dudley B. Bonsal, J., denying his motion for a preliminary injunction to [illegible] at his call-up for two years active duty pursuant to [illegible] obligation as an officer in the United States Navy Re[illegible]ves.

Plaintiff, a Lieutenant Commander in the United States Navy, brought this action on June 21, 1976 by order to show cause, seeking, *inter alia*, temporary and preliminary injunctive relief following the Navy's denial of his application for release from active service. Plain-

tiff's application had been based upon his claim of hardship and the fact that he had reached his 35th birthday and was therefore purportedly ineligible for active service. Although plaintiff was scheduled to report for active duty on July 7, 1976, defendants-appellees ("defendants") consented to stay plaintiff's orders pending determination of his motion for a preliminary injunction.

On November 8, 1976, the District Court denied plaintiff's motion, holding that the Navy had complied with 50 U.S.C. § 454(1)(4) and the applicable Navy regulations and that the Court lacked authority to interfere with the Navy's administrative processes because defendant had failed to exhaust his administrative remedies (A. 3-10). Plaintiff voluntarily reported for active duty at the Naval Hospital in Orlando, Florida on or about November 11, 1976.

The jurisdiction of this Court is founded upon 28 U.S.C. §1292(a)(1).

Issues Presented for Review

a) Whether the United States Navy was authorized under 50 U.S.C. § 454(1)(4) and pertinent Naval Regulations governing the operation of the Berry Plan, to order appellant to two years active duty.

b) Whether the plaintiff was required to exhaust his administrative remedies before commencing this action.

Statement of Facts

In 1969 plaintiff applied to the Department of the Navy (the "Department") for a commission in the United States Naval Reserve Medical Corps, pursuant to the Armed Forces Physicians' Appointment and Residency

Consideration Program, commonly referred to as the "Berry Plan" (A. 26). Pursuant to that application, on or about September 14, 1969 plaintiff entered into an agreement with the Department whereby he expressly agreed as follows:

> "I consent to serve on active duty as a commissioned officer for a period of two (2) years at the conclusion of deferment if the needs of the service so require." (A. 30, 31).

Plaintiff's application was approved, and on November 4, 1969 he was commissioned as a lieutenant in the Naval Reserve Medical Corps (A. 26). On or about February 26, 1970 plaintiff requested a five year postponement of active service to complete his residency training in general surgery (A. 26). His request was granted on an annual basis. Thereafter, plaintiff submitted forms requesting continued deferments in 1971, 1972, 1973 and 1974 (A. 26, 27) and was in each case granted the requested deferment.

By letter dated January 28, 1974 plaintiff requested an additional one year deferment in order to accept a fellowship in surgical oncology at Roswell Park Memorial Hospital in Buffalo, New York (A. 41). In his letter, Dr. Silverman acknowledged that he was subject to active duty in July, 1974, and in making his request for continued deferment, he stated that ". . . this additional formal training will be invaluable to me and at the same time make *my service* to the NAVY more useful." (Emphasis added). By letters dated January 29, 1974 and February 22, 1974, the Department informed plaintiff that his request for continued deferment from July 1974 through July 1975 to complete advance surgical training had been approved, and further indicated that he would be called to active duty in the summer of 1975 (A. 40-42).

On February 22, 1974 plaintiff again wrote to the Department indicating that he had changed his plans and that he was now interested in accepting a fellowship at Sloan Kettering Memorial Cancer Center (A. 27).* On or about September 9, 1974, plaintiff wrote to the Department, confirming that he was currently a fellow at Sloan Kettering in a 2 year program and requesting that his "deferment be extended through June 30, 1976, so that I may complete the program here" (A. 46).

On or about September 23, 1974 Captain Barcay of the Department responded to plaintiff's letter by indicating that the Department would not be in a position to act upon his latest request (for deferment beyond July 1975) until it had evaluated its needs for 1975 in January of that year (A. 27, 28). This letter was followed by a form letter from Captain Barcay on October 29, 1974 requesting plaintiff to complete a Berry Plan Option Sheet and a questionnaire designed to elicit plaintiff's preference as to time and place of active service. Plaintiff was also requested to forward a curriculum vitae in order for the Department to evaluate their needs for his particular specialty (A. 28).

On or about November 1, 1974 plaintiff forwarded the curriculum vitae, the completed questionnaire and option sheet (A. 28). In the questionnaire and option sheet plaintiff clearly stated that he expected to complete his surgical training on June 30, 1976 and that he wished to begin active duty on July 1, 1976. On December 4,

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* On or about March 1974, plaintiff forwarded to the Department a "Request for Continued Deferment" in which he requested that his "active naval service be postponed to permit me to complete the two (2) years of residency in surgical oncology" at Sloan Kettering (A. 45).

1974, in accord with plaintiff's request, the Department informed plaintiff that he would be granted a deferment until June 30, 1976 (A. 28).

On October 31, 1975 Captain Barcay of the Department wrote to plaintiff reminding him that he was in his last year of deferment and was scheduled to come on active duty shortly after his deferment ended (A. 28). In order to determine plaintiff's preference for time and place of active service, Captain Barcay instructed plaintiff to complete another questionnaire and forward it along with an updated curriculum vitae (A. 28). Plaintiff responded to Captain Barcay on November 9, 1975 by forwarding the completed questionnaire and the curriculum vitae. He also requested further information concerning the Department's intention to call him to active duty and stated his preference regarding duty assignments (A. 28, 29).

On or about December 8, 1975 plaintiff again wrote to Captain Barcay regarding whether he would be called to active duty, and, if so, where he would be assigned. Captain Barcay responded on December 22, 1975, reiterating that the Department intended to call him to active duty in the summer of 1976 and, indeed, that no surgeons were being released from their Berry Plan commitments (A. 29).

By letter dated March 23, 1976 Captain Barcay advised plaintiff that he was scheduled for active service on July 7, 1976, with his permanent duty assignment being the Naval Regional Medical Center, Orlando, Florida (A. 29). Shortly thereafter, on April 8, 1976 Steven Hyman, Esq., plaintiff's attorney, wrote to the Bureau of Naval Personnel within the Department, enclosing plaintiff's formal request of April 6, 1976 for release from his commitment to active service (A. 30, 31).

A board of officers was convened by the Chief of Naval Personnel to consider plaintiff's request for release. On or about June 11, 1976, based upon a consensus of that board, the Chief of Naval Personnel denied plaintiff's request and so notified him (A. 23). In that letter, the Chief of Naval Personnel advised plaintiff that he was still obligated to active service in the Navy and that the hardship reasons set forth in his April 6 letter did not warrant rescission of his active duty commitment. As set forth in a memorandum dated April 23, 1976 from the Chief of the Bureau of Medicine and Surgery to the Chief of Naval Personnel, it was anticipated that in "July 1976 there will be an urgent need for [Dr. Silverman's] services at the Naval Regional Medical Center, Orlando, Florida" (A. 65). Commander D. J. Brideau's affidavit, dated July 2, 1976, underscored the need for Dr. Silverman's services (A. 67, 68).

Subsequent to denial of his request by the Chief of Naval Personnel, Dr. Silverman took no action to petition the Board of Correction of Naval Records, which has the authority within the Department to review the decision of the Chief of Naval Personnel (A. 66).

Proceedings Below

On June 21, 1976 plaintiff commenced this action by service upon the United States Attorney for the Southern District of New York of an order to show cause, seeking declaratory, preliminary and permanent injunctive relief (A. 20).* In his complaint, plaintiff alleged that the Navy

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* Plaintiff's initial orders required him to report to active duty on July 7, 1976. Upon commencement of this action, however, the defendants consented to stay plaintiff's orders pending a determination by the District Court of his motion for a preliminary injunction.

had acted contrary to 50 U.S.C. § 456(a)(1) and 50 U.S.C. §§ 454(l)(1) and 10 U.S.C. 651 (A. 17). During the briefing and argument stages—oral argument was held on July 11, 1976—plaintiff abandoned his theories predicated upon 50 U.S.C. § 456(a)(1) and 10 U.S.C. § 651 and sought relief solely on the basis of § 454(l)(1).

On November 8, 1976, Judge Bonsal, in a memorandum opinion denied the requested relief and granted defendants' cross-motion to dismiss, holding that plaintiff had failed to exhaust available intra-service corrective measures and that in any event plaintiff's voluntary consent to serve two years active duty authorized his call-up under § 454(l)(4).

On November 11, 1976 a judgment was entered dismissing the complaint herein. This expedited appeal followed.

Principal Statutes Involved

Title 50, U.S.C. App. §454:

* * *

(l) Order to active duty of reserve components in medical, dental, or allied specialist categories; period; age limit; computation of period; opportunity to resign commission; volunteer service

(1) The President may order to active duty (other than for training), as defined in section 101(22) of title 10, United States Code [section 101(22) of Title 10], for a period of not more than twenty-four consecutive months, with or without his consent, any member of a reserve component of the Armed Forces of the United States who

is in a medical, dental, or allied specialist category, who has not attained the thirty-fifth anniversary of the date of his birth, and has not performed at least one year of active duty (other than for training). This subsection does not affect or limit the authority to order members of the reserve components to active duty contained in section 672 of title 10, United States Code [section 672 of Title 10].

* * *

(4) Any physician or dentist who meets the qualifications for a Reserve commission in the respective military department shall, so long as there is a need for the services of such a physician or dentist, be afforded an opportunity to volunteer for a period of active duty (other than for training) of not less than twenty-four months. Any physician or dentist who so volunteers his service, and meets the qualifications for a Reserve commission shall be ordered to active duty (other than for training) for not less than twenty-four months, notwithstanding the grade or rank to which such physician or dentist is entitled.

Title 10, U.S.C. §1552 provides, *inter alia*:

"(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error *or remove an injustice.* Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under

this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor . . . within three years after he discovers the error or injustice, whichever is later. . . ." (Emphasis added.)

Title 10 U.S.C. § 672(d) authorizes the Secretary or his designate to order members of reserve components to active duty; it provides, in pertinent part:

"At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member . . ."

Principal Regulations Involved

Department of Defense Instruction 1205.1—Implementation of the Universal Military Training and Service Act With Respect to Medical and Dental Registrants:

"I. PURPOSE

The purpose of this instruction is to implement those provisions of the Universal Military Training and Service Act, as amended, and other pertinent laws and directives which relate to medical and dental specialist personnel registered thereunder who have a liability for training and service (hereinafter referred to as 'medical and dental registrants') under the provisions of Section 4 of the Universal Military Training and Service Act."

* * *

"X. ORDERING COMMISSIONED PERSONNEL TO ACTIVE DUTY

A. Any physician or dentist who is a member of a reserve component of one of the Armed Forces, who has not attained his 35th birthday, and who has not performed at least one year of active duty (other than for training), exclusive of periods spent in student programs prior to receipt of the appropriate professional degree or in intern training, *may* be ordered with or without his consent to active duty (other than for training) as an individual for a period of not more than 24 months pursuant to subsection 4(1), Universal Military Training and Service Act, as amended.

* * *

E. Any physician or dentist who meets the qualifications for a reserve commission in the respective military departments shall, so long as there is a need for his services, be afforded an opportunity, pursuant to subsection 4(1)(4), Universal Military Training and Service Act, as amended, to volunteer for a period of active duty for not less than 24 months."

32 C.F.R. 58.1(b), in describing the Berry Plan, provides:

(b) It permits participating physicians to be brought to active duty in fulfillment of their obligation for military duty at mutually acceptable times by providing for the (1) appointment in the Reserve components of qualified participants in the program who are vulnerable for military service under the provisions of the Universal Military Training and Service Act, as amended (50 U.S.C. app. 454(a)), and (2) deferment from military service of selected participants in order to permit

them to undergo approved residency training in the various specialties required by the Armed Services.

Navy Recruitment Manual [Comnavercruitcom Instruction 1110.A] provides, *inter alia*:

> "This program leads to appointment in the Medical Corps, U. S. Naval Reserve, for inactive duty while completing civilian residency training or research projects. Upon completion of training, participants will be required to serve on active duty."
>
> * * *
>
> "ELIGIBILITY REQUIREMENTS
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> a. *Sex*—Male or female;
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> b. *Citizenship*—U. S. Citizen;
>
> c. *Age*—21-41".
>
> * * *
>
> "Participants *must agree* that upon completion of training or upon discontinuance of training in the specialty for which selected, they will serve on active duty for *two years* unless obligated for longer period as a result of participation in other programs. While in training, participants will not be called to active service except in the event of war or national emergency declared by the President or by Congress."

ARGUMENT

POINT I

The Department Had Sufficient Authority To Order Plaintiff To Active Service.

The Secretary or his designate is authorized under 10 U.S.C. § 672 (d) to order a member of a reserve component to active duty, so long as such action is taken pursuant to the member's consent.

> "At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member . . ."

In summary, it is appellant's contention that plaintiff expressly consented to be called to active duty at the end of his medical deferments, and that such consent was envisioned and provided for by statute. 50 U.S.C. §454 (1) (4).

a) The Plaintiff Has A Contractual Obligation to Serve

Plaintiff, in a September 14, 1969 writing, prior to accepting a commission and the inherent compulsions of such acceptance, volunteered to serve two years of active duty upon completion of his deferments:

> "I consent to serve on active duty as a commissioned officer for a period of two (2) years at the conclusion of deferment if the needs of the service so require." (A. 30, 31).

On February 25, 1970 plaintiff requested a five year deferment from active service to complete residency train-

ing in general surgery (A. 2). The deferment was granted by the Department for the first year (A. 2). Implicit in this request for a deferment was an acknowledgement of an obligation to commence active service once his training was completed. Plaintiff repeated his request on four separate occasions. Each request affirmed his obligation and by each request he implicitly promised to serve on active duty upon completion of his training. When plaintiff's deferment ended in July 1974 (plaintiff was then 34 years old), he requested that his active duty commitment again be "postponed" for two years so that he could pursue continued training (See A. 41, 44-46). The Navy again acceded to his request and informed him that his "request for active service in July 1976 rather than July 1975 has been approved." (A. 54, 55).

Additional evidence of plaintiff's voluntary commitment to serve two years active duty upon completion of his surgical training is contained in the two questionnaires which he completed and signed on November 1, 1974 and November 10, 1975 (A. 53, 59). In each of these questionnaires plaintiff specifically stated that he would complete his medical training on June 30, 1976 and that he desired to commence active duty on July 1, 1976 (A. 52, 53, 59). Having gained the obvious benefit of these affirmations, plaintiff surely cannot now claim that these statements were not freely given. It is also noteworthy that the statement of November 10, 1975 was made after Dr. Silverman had reached his 35th birthday and shortly after the sixth anniversary of his commission, acknowledging and confirming his voluntary commitment to active service.

The Department's order was issued pursuant to plaintiff's promise to serve two years active duty at the end of deferments. In essence, the Department's position is that it has granted deferments as requested by plaintiff

so that he could complete his education. Now it merely requests that he perform as promised.

Absent some claim of invalidity, which plaintiff does not assert, the September 14, 1969 writing represents a binding agreement between the plaintiff and the Department which the Court below recognized (A. 8). *See In re Grimley*, 137 U.S. 147 (1890); *McCord* v. *Page*, 124 F.2d 68, 70 (5th Cir. 1941); *Even* v. *Clifford*, 287 F.Supp. 334 (S.D. Cal. 1968).*

Plaintiff does not claim to have been coerced into accepting his commission. Nor does he claim to have been coerced into promising to serve on active duty. Yet he would have this Court completely ignore the terms and conditions of acceptance of that commission as embodied in the writing of September 14, 1969 and in all of plaintiff's subsequent requests for deferments. (A. 30, 31).

b) Section 454(l)(4) Supports The Terms of The Agreement

The terms and conditions of the September 14, 1969 agreement are uncontroverted by plaintiff. Plaintiff volunteered to serve two years active duty at the end of his deferments.

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* Moreover, in receiving the benefits of the deferments—a forebearance by the Department to enforce an undeniable right—plaintiff is estopped from now claiming that the Department has no authority to order him to active duty. The Department's reliance on plaintiff's promises and its change of position with respect to its rights in 1974, when plaintiff was subject to involuntary call even in the absence of an agreement to serve, are sufficient to require plaintiff to perform his agreement and estop him from using the Department's change of position as a defense. *See* Williston on Contracts, Third Edition § 98 "Estoppel" and § 135A "Forebearance," pp. 360, 569; *See also In re Grimley, supra,* 137 U.S. 147.

"1. Having *volunteered* for participation in the Berry Plan/ORD (Osteopathic Residence Deferment) Program, I hereby acknowledge:

c. That:

* * *

(2) upon acceptance of a commission, I will be required to serve at the conclusion of deferment for a period of 24 months as a Reserve Officer in the United States Navy . . .

* * *

2. I consent to serve on active duty as a commissioned officer for a period of two (2) years at the conclusion of deferment if the needs of the service so require.

3. I have read and completely understand the meaning and content of the above. No promises either written or oral have been made to me in connection with my application to the Berry Plan/ORD Program, except as specified above. I acknowledge receipt of a copy of this document." (Emphasis added) (A. 30, 31).

These terms are clear and uambiguous. The only inquiry should be directed to whether the terms exceed statutory authority. Defendant submits that the obviously voluntary nature of plaintiff's promise to serve is sanctioned by § 454(1)(4).

Plaintiff proffers but one argument to rebut the application of § 454(1)(4) to the terms of the agreement. He asserts that it was not intended to cover those physicians who are eligible for induction under § 454(a). However, even the most labored and imaginative argument cannot restrict the clear, unambiguous language of § 454(1)(4), which is almost identical to the terms of September 14, 1969 agreement.

> "Any physician or dentist who meets the qualifications for a Reserve commission in the respective military department shall, so long as there is a need for the services of such physician or dentist, be afforded an opportunity to volunteer for a period of active duty (other than for training) of not less than twenty-four months. Any physician or dentist who so volunteers his service, and meets the qualifications for a Reserve commission shall be ordered to active duty . . . for not less than twenty-four months . . ." 50 U.S.C. § 454(l)(4).

Nowhere on the face of the provision is there language excluding "physicians," such as plaintiff, from eligibility for voluntary service.* Indeed, a review of the legislative history firmly supports this reading. At page 11 of appellee's brief, plaintiff quotes from the House Armed Services Committee Report No. 394, which states:

> "[The Committee on Armed Services has also amended the proposed legislation so as to permit a physician or dentist who meets the qualifications for a Reserve commission to be afforded an opportunity to volunteer for a period of active duty of not less than 24 months within the needs of the armed services.] This provision is now contained in existing law which will expire on July 1, 1957. Since this legislation is discriminatory in that it singles out physicians, dentists, and allied specialists for special call over the age of

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* Plaintiff's assertion that the provision relates to physicians and not reservists is nothing more than a red herring. (Appellant's Brief, pp. 9, 10). Plaintiff was a physician in 1969, at the time that he volunteered to serve two years active duty pursuant to the terms of § 454(l)(4).

> 26, there appears to be no reason why the armed services should not be required to accept the volunteer services of physicians and dentists and allied specialists who are not subject to the provisions of the proposed legislation if by accepting their services it will reduce the necessity for the involuntary call of another physician, dentist, or allied specialist, who is otherwise liable within the terms of the proposed legislation. (House Miscellaneous Rep. on Pub. Bills II, Vol. 328.734-11895 Report No. 394, p. 8).

The bracketed first sentence of the above paragraph is omitted from the quote appearing in plaintiff's brief. This sentence summarizes the clear intent of § 454(1)(4) to offer physicians an opportunity to volunteer their services and establishes the context in which the language quoted by plaintiff is expressed.

The entire statement is merely a comment on the scope of § 454(1)(4). By indicating that physicians not subject to the "Doctor Draft Law" could volunteer under § 454(1)(4), the commentator was in no way implying that physicians subject to the Doctor Draft Law were excluded from volunteering their services under § 454(1)(4). Plaintiff's statement that the second sentence of the quote restricts the scope of § 454(1)(4), while omitting reference to the prior sentence, is clearly misleading. By employing the full text, it becomes evident that § 454(1)(4) was intended to cover "[a]ny physician or dentist who meets the qualifications for a reserve commission . . ." *

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* There is no support in the House Armed Services Committee Report No. 394 for plaintiff's assertion that the Defense Department opposed § 454(1)(4) (Appellant's Brief, p. 10).

c) The Regulations and Instructions Support Agreement

The Berry Plan was designed to provide military departments with a pool of physicians for future years, while simultaneously serving as a vehicle by which these physicians could postpone active service until they completed advanced training in chosen fields of expertise. The enabling regulations are very clear in this regard. 32 C.F.R. 58.1(b), in describing the Berry Plan, provides:

> (b) It permits participating physicians to be brought to active duty in fulfillment of their obligation for military duty at mutually acceptable times by providing for the (1) appointment in the Reserve components of qualified participants in the program who are vulnerable for military service under the provisions of the Universal Military Training and Service Act, as amended (50 U.S.C. app. 454(a)), and (2) deferment from military service of selected participants in order to permit them to undergo approved residency training in the various specialties required by the Armed Services.

This purpose is expressed equally clearly in Navy Recruitment Manual [Comnavercruitcom Instruction 1110.A] (the "Recruitment Manual"):

> "This program leads to appointment in the Medical Corps, U. S. Naval Reserve, for inactive duty while completing civilian residency training or research projects. Upon completion of training, participants will be required to serve on active duty." (A. 73).

Implementation of this purpose was obviously to be consistent with the various statutes and regulations governing the service of physicians and other similarly

classified registrants. Hence, the pertinent Department of Defense instruction and Navy regulation refer to both § 454(1)(1) and § 454(1)(4). The Navy's regulations governing the implementation of the Plan are memorialized in the Recruitment manual, which provides, *inter alia*:

> "ELIGIBILITY REQUIREMENTS
>
> a. *Sex*—Male or female
>
> b. *Citizenship*—U. S. Citizen
>
> c. *Age*—21-41" [A. 73].
>
> * * * * *
>
> "Participants *must agree* that upon completion of training or upon discontinuance of training in the specialty for which selected, they will serve on active duty for *two years* unless obligated for longer period as a result of participation in other programs. While in training, participants will not be called to active service except in the event of war or national emergency declared by the President or by Congress." [A. 75, 75]. (Emphasis added.)

The Navy established age 41 as the maximum age for eligibility in the Berry Plan and provided that participants are required to agree to serve two years active duty upon completion of their professional training. These provisions are consistent with and lend support to the September 14, 1969 agreement which plaintiff entered into with the Department (A. 30-31). Conclusive authority for these provisions is contained in the Department of Defense Instruction 1205.1, which is the instruction for implementation of the Selective Service Act together with other pertinent directives relating to medical specialists, including the Berry Plan.* Instruction 1205.1 provides, *inter alia*:

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* It is important to note that while plaintiff vehemently denies the applicability of § 454(1)(4), he urges that Instruction 1205.1, embodying that very provision, is the governing Department of Defense Instruction. (*See* Appellant's Brief, p. iv; and *Appelwick* v. *Hoffman*, 540 F.2d 404, 407 (8th Cir. 1976).

"I. PURPOSE

The purpose of this instruction is to implement those provisions of the Universal Military Training and Service Act, as amended, and other pertinent laws and directives which relate to medical and dental specialist personnel registered thereunder who have a liability for training and service (hereinafter referred to as "medical and dental registrants") under the provisions of Section 4 of the Universal Military Training and Service Act."

* * * * *

X ORDERING COMMISSIONED PERSONNEL TO ACTIVE DUTY

"E. Any physician or dentist who meets the qualifications for a reserve commission in the respective military departments shall, so long as there is a need for his service, be afforded an opportunity pursuant to subsection (4)(1)(4), Universal Military Training and Service Act, as amended, to volunteer for a period of active duty for not less than 24 months." [A. 95, 96].

The relationship of § 454(1)(4) to the Berry Plan is illustrated by the facts in the present case. In 1969 physicians were subject to be called to active duty before reaching their thirty-fifth birthday. If their educational goals extended beyond their thirty-fifth birthday they would naturally be required to interrupt their education in order to fulfill their military obligation. If these physicians enrolled in the Berry Plan and received a commission, without giving a concomitant enforceable promise to serve for two years, they would still have to

be called to active duty by age thirty-five. 50 U.S.C. § 454(l)(1). But physicians faced with this dilemma could satisfy their obligation, and at the same time insure completion of their education by volunteering to serve two years active duty pursuant to § 454(l)(4). Thus employment of § 454(l)(4) in circumstances such as the present case obviously advances the overall objective of the Berry Plan by providing an opportunity for physicians to complete advance training which will satisfy needs of the respective military departments over the years.

Therefore, inclusion of the language of § 454(l)(4) in the pertinent regulation and instruction is understandable. Indeed, in circumstances similar to those described above, the only plausible way to fulfill the objective of the Berry Plan would be by resort to a voluntary agreement. More important, is the fact that the military's primary objective was, and is today, the securing of needed physicians under both § 454(l)(4) and § 454(l)(1). It is submitted that, plaintiff consented to serve under § 454(l)(4) and should now be required to fulfill the obligation which he voluntarily created.

d) Plaintiff's Reliance Upon 50 U.S.C. § 454(l)(1) Is Misplaced

Plaintiff's sole effort to avoid the plain language and intent of § 454(l)(4) is based upon a misreading of Title 50 United States Code, § 454(l)(1). That section provides:

> The President may order to active duty (other than for training), as defined in section 101(22) of title 10, United States Code [section 101(22) of Title 10], for a period of not more than twenty-four consecutive months, with or without his consent, any member of a reserve component of the

> Armed Forces of the United States who is in a medical, dental, or allied specialist category, who has not attained the thirty-fifth anniversary of the date of his birth, and has not performed at least one year of active duty (other than for training). This subsection does not affect or limit the authority to order members of the reserve components to active duty contained in section 672 of title 10, United States Code [section 672 of Title 10]. (Title 50 U.S.C. § 454 (l) (1)).

The legislative history of Section 454 (l) (1) indicates that the section was enacted to give the President authority to call physicians who had not attained their 35th birthday to involuntary active duty for a period of 24 months. The purpose of this provision is set forth in Senate Report No. 411:

> "The bill provides express Presidential authority (Sec. 2, par. 1) to order any medical or dental member of a reserve component to active duty for a period of 24 months if he has not already served at least 1 year and has not passed age 35. It is expected that this legislation, as in the case of the doctor draft law, will operate by indirection. All medical and dental specialists who are commissionable will be offered Reserve Commissions in lieu of induction. This paragraph in effect provides Presidential authority for their *involuntary* call to active service after they have been awarded their Reserve commissions. *Without this language there would be no specific Presidential authority for call of Commissioned officers and the military would have to rely solely on the moral commitment of the men to voluntarily enter active service after they have been*

given a commission . . ." (1957) U.S. Code Cong. & Adm. News p. 1255, 1257-58 (Emphasis Added)

The above analysis clearly establishes that the purpose of Section 454(1)(1) was to provide the President with authority to call to active service reserve officers who accepted commissions without a concomitment written agreement consenting to active service. The provision was enacted to give notice to a certain class of reserve officers that they would be subject to an involuntary call to active duty until age 35.

Unlike the circumstances envisioned in the above legislative history, in the present case the Department does not have to rely upon a moral commitment to serve, for the plaintiff in this case signed a binding written agreement, prior to taking his commission, promising to serve on active duty at the end of his deferments. The gravamen of § 454(1)(1) is the involuntary nature of the call-up; it is therefore clear that this section is inapplicable to this case because plaintiff volunteered to serve two years on active duty. Indeed, the voluntary nature of his commitment demonstrates the applicability of § 454(1)(4), which specifically provides that "any physician . . . who . . . volunteers his service . . . shall be ordered to active duty for . . . not less than twenty-four months."

Plaintiff relies almost exclusively upon a vague footnote in *Appelwick* v. *Hoffman*, 540 F.2d 404, 407 n.5 (8th Cir. 1976) to support his suggestion that the Berry Plan is predicated solely upon § 454(1)(1) (Appellant's Brief, pp. 8, 9, and 11). The reference is misleading and clearly misplaced. In discussing the plaintiff's claim that an Army regulation was inconsistent with that part of Department of Defense instruction 1205.1 pertaining to hardship deferments, the Eighth Circuit noted:

> "It is not at all certain that the Defense Department Instruction was intended to do more than establish procedural forms, leaving the formulation of substantive rules to the military departments. General authority to order members of reserve components in medical, dental, or allied specialties who have not served at least one year of active duty, and who are under 35 years of age, to active duty for not more than two years is invested in the President by 50 U.S.C. App. § 454(1) (1970). The President delegated his authority to the Secretary of Defense in Executive Order No. 10762, 23 Fed. Reg. 2119, March 28, 1958. This authority was redelegated to the secretaries of the three military departments, see 32 C.F.R. § 76.6 (1975). This statutory and administrative pattern appears to give the Army the power to establish whatever substantive guidelines it deems desirable. As noted above, there is nothing on the face of the D.o.D. Instruction inconsistent with the Army's formulation of substantive standards to be applied. For the purposes of this opinion, however, we will assume that the D.o.D. Instruction does impose some substantive limits on the Army's rulemaking authority." *

The note merely reiterates what is not at issue in this case—the President's general authority to call up reservists under 454(1)(1). Contrary to plaintiff's suggestion, the note does not state that § 454(1)(1) is the only predicate for the Berry Plan, nor can such an interpretation be read into the note.* The discussion

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* In light of the use in Army Instruction 1205.1 X(E) of the language of § 454(1)(4), authorizing the activation of commissioned officers to duty, this argument is not very cogent.

concerns only the powers of the Army to formulate regulations in light of the limited delegation of authority from the President under 454(1)(1). Neither *Appelwick* nor the note therein have the slightest connection with the issues presented in the present case.

POINT II

Plaintiff Has Failed To Exhaust His Administrative Remedies.

a) The District Court's Decision Supported By Ample Authority

Plaintiff has failed to exhaust his administrative remedies. Title 10, U.S.C. § 1552 provides, *inter alia*:

> "(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error *or remove an injustice*. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.
>
> (b) *No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor . . . within three years after he discovers the error or injustice, whichever is later . . .*" (Emphasis added.)

The Secretary of the Navy, under § 1552, is empowered to "correct any military record . . . when he considers it necessary to correct an error or remove an *injustice.*" Pursuant to that authority, the Department has established internal guidelines for redress of grievances such as those in the present case, which are implemented by civilian appointees. 32 C.F.R. 723 *et seq.*

The Board of Correction of Naval Records was established to address grievances that may result in a substantial injustice to the applicant (32 C.F.R. 723.2). The procedures provide for an administrative hearing on notice to an applicant and an impartial determination of the grievance based upon the facts and applicable law (32 C.F.R. 723.4). Written findings, a decision and recommendations are forwarded to the Secretary of the Navy (32 C.F.R. 723.6). The Secretary will then direct such action in the matter as he deems appropriate (32 C.F.R. 723.7). Upon final action by the Secretary, the record is returned to the Board for final disposition (32 C.F.R. 723.8).

It is apparent from the chronology of events in the present case that plaintiff had ample time to apply to the Board of Correction. He apparently learned of the basis of his claim by April 1976, and received notice of the Chief of Navy Personnel's decision at least one month prior to his scheduled active service. Sufficient time remained for plaintiff to apply to a higher administrative forum for redress before turning to the courts.

As reflected in the affidavit of John E. Corcoran, Executive Secretary of the Board of Correction of Naval Records, plaintiff has never applied to the Board, and thus has failed to exhaust his administrative remedies. In addressing the plaintiff's failure to exhaust, the Court below succinctly stated the governing principals:

> "The Supreme Court has repeatedly warned against premature Court interference with military procedures. *See Orloff* v. *Willoughby*, 345 U.S. 83 (1953); *Burns* v. *Wilson*, 346 U.S. 137 (1953); *Gilligan* v. *Morgan*, 413 U.S. 1 (1973). Indeed, ' "a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, *and* (b) exhaustion of available intraservice corrective measures'." *Mindes* v. *Seaman*, 453 F.2d 197, 201 (5th Cir. 1971)" (A. 8). (Emphasis added).

Without some showing of exhaustion of intraservice corrective measures, the courts lack jurisdiction to review internal military affairs. *Beard* v. *Stahr*, 370 U.S. 41 (1962). In *McGee* v. *Schlesinger*, 378 F. Supp. 318, 321 (W.D. Texas 1974), a case involving circumstances very similar to the facts in the present case, the Court stated:

> "10 U.S.C. § 1552 *authorizes* the Secretary of the Air Force to 'correct any military record . . . when he considers it necessary to correct an error or remove an injustice.' Pursuant to the authority contained in this statute as implemented by AFR 31-3 the Air Force Board for Correction of Military Records is available for precisely the relief sought by the Petitioner. Inquiry of the Board discloses that Petitioner has failed to avail himself of this administrative remedy. According to *Mindes*, supra, 'a Court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right or an allegation that the military has acted in violation of applicable statutes or its own regu-

> lations and (b) *exhaustion of available intra-service corrective measures.*' 453 F.2d 197, 201. Therefore, until Petitioner does exhaust his administrative remedies he is barred from seeking judicial relief by the second prong of the *Mindes* test." (Cites omitted).

Although it is conceded that plaintiff's letter of April 6, 1976 was reviewed and acted upon by a board authorized by the Chief of Naval Personnel (Brideau Aff.), there is absolutely no showing in the record before this Court that an effort was made to prevail upon the Board of Corrections of Naval Records as provided for by § 1552. *Morbeto* v. *United States*, 293 F. Supp. 313 (C.D. Cal. 1968), is enlightening in this respect. In *Morbeto*, plaintiff challenged denial of an application for a conscientious objector's discharge from the service, and sought declaratory and injunctive relief. In disposing of the challenge, the Court stated:

> "Plaintiff alleges that he had exhausted all of his administrative remedies as a necessary prerequisite to this Court acquiring jurisdiction of the subject matter. However, since plaintiff has failed to allege that any attempt was made to apply to the Board for Correction of Military Records pursuant to 10 U.S.C. § 1552, he has not exhausted his 'military' administrative remedies prior to bringing this action.
>
> Resort to this Court for a temporary and permanent injunction is premature where the plaintiff has not exhausted his available administrative remedies." *Id.*, p. 321 [cites omitted].

The facts in the present case are no different than the facts in *Morbeto*, and it is respectfully submitted that the result should be no different.

b) The Cases Cited By Plaintiff Are Inapplicable

Plaintiff cites several cases in support of the proposition that he was not required to exhaust administrative remedies before prevailing upon the court for relief (Appellee's Brief, p. 4). The cases cited by plaintiff are inapposite. In *Smith* v. *Resor*, 406 F.2d 141 (8th Cir. 1969), the Court found that plaintiff was properly before the court because he had been foreclosed from pursuing his administrative remedies by a military superior who deliberately tampered with the military record. *Id.*, at 145, 147. Surely plaintiff makes no such claim in this case.

In *Hammond* v. *Lenfest*, 398 F.2d 705 (2d Cir. 1968), this Court merely reiterated the oft-stated principle that where nothing can be gained by exhausting administrative remedies, courts should discard the doctrine. Unlike *Hammond*, plaintiff cannot and does not even attempt to demonstrate that nothing could have been gained by exhaustion of his intra-service remedies. In view of the broadly defined jurisdiction of the Board for Correction of Military Records to "remove an injustice", plaintiff had not exhausted a viable administrative remedy before bringing this action.

In *Hornstein* v. *Laird*, 327 F. Supp. 993 (S.D.N.Y. 1971), the Court specifically stated that plaintiffs exhausted the administrative remedies available to them, *Id.*, p. 995; while *Kurlan* v. *Callaway*, 510 F.2d 274 (2d Cir. 1974), did not even involve an issue of exhaustion.

In support of the contention that his claim should not be required to await administrative determination and that it is properly before this Court, plaintiff cites as well *Morse* v. *Boswell*, 289 F. Supp. 812 (D. Md. 1968), *aff'd*, 401 F.2d 544 (4th Cir. 1968); *Goldstein* v. *Clifford*, 290 F. Supp. 275 (D. N.J. 1968); *Winters* v. *United States*,

281 F. Supp. 289 (E.D.N.Y. 1968), *aff'd*, 390 F.2d 879 (2d Cir. 1968) (Appellee's Brief p. 6). These citations are perplexing in that none of the cases involve an issue of exhaustion. Presumably, the plaintiffs in those cases had exhausted administrative remedies prior to commencing judicial proceedings.

In sum, plaintiff has failed to marshal any case law in support of the proposition that he was not required to appeal administratively. The authorities that he cites are not only not dispositive; they are not even on point.

CONCLUSION

Issuance of a preliminary injunction requires a showing of probable success on the merits. Inasmuch as plaintiff failed to make such a showing below, the District Court properly denied his motion for such relief. It is therefore respectfully submitted that the order of the District Court should be affirmed.

Respectfully submitted,

Dated: February 2, 1977
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State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 2nd day of February 1977 she served ~~x~~/two copys of the within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

Kunstler and Hyman
370 Lexington Avenue
New York, New York 10017

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian L. Bryant

Sworn to before me this

2nd day of February, 1977

Ralph L. Lee

RALPH L. LEE
Notary Public, State of New York
No. 41-2[illegible] Queens County
Term Expires March 30, 1977